

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

LARRY M. ZEIGLER, ) CASE NO. CV 06-6761 JTL  
Plaintiff, )  
v. ) MEMORANDUM OPINION AND  
MICHAEL J. ASTRUE, ) ORDER  
Commissioner of Social Security )  
Defendant. )

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**PROCEEDINGS**

On October 19, 2006, Larry M. Zeigler (“plaintiff”) filed a Complaint seeking review of the Social Security Administration’s denial of his applications for Supplemental Security Income benefits and Disability Insurance Benefits. On November 16, 2006, plaintiff and Michael J. Astrue, the Commissioner of Social Security (“defendant”), each filed a Consent to Proceed Before United States Magistrate Judge Jennifer T. Lum. Thereafter, on May 1, 2007 , defendant filed an Answer to the Complaint. On August 2, 2007, the parties filed their Joint Stipulation.

The matter is now ready for decision.

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## BACKGROUND

On September 3, 2004, plaintiff applied for Supplemental Security Income benefits and Disability Insurance Benefits. (Administrative Record [“AR”] at 45, 184). Plaintiff’s applications were denied both initially and upon reconsideration. (AR at 23-25, 32, 188, 189).

Thereafter, on May 26, 2005, plaintiff requested a hearing before an Administrative Law Judge (“ALJ”). (AR at 40). On June 13, 2006, the ALJ conducted a hearing in Long Beach, California. (See AR at 190-205). Plaintiff appeared at the hearing with counsel and testified. (AR at 192-200, 204). Gregory Jones, a vocational expert, also testified at the hearing. (AR at 201-03). On June 10, 2006, the ALJ issued his decision denying benefits to plaintiff. (AR at 11-17). The Appeals Council denied plaintiff’s timely request for review of the ALJ’s decision. (AR at 4).

Thereafter, plaintiff appealed to the United States District Court.

## **PLAINTIFF'S CONTENTIONS**

Plaintiff makes the following claims:

1. The ALJ failed to properly consider the state agency physician's opinion of plaintiff's functional status.
  2. The ALJ failed to pose a complete hypothetical to the vocational expert.

## **STANDARD OF REVIEW**

Under 42 U.S.C. § 405(g), this Court reviews the ALJ's decision to determine whether the ALJ's findings are supported by substantial evidence and whether the proper legal standards were applied. DeLorme v. Sullivan, 924 F.2d 841, 846 (9th Cir. 1991). Substantial evidence means “more than a mere scintilla” but less than a preponderance. Richardson v. Perales, 402 U.S. 389, 401 (1971); Saelee v. Chater, 94 F.3d 520, 521-22 (9th Cir. 1996).

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1 Substantial evidence is “such relevant evidence as a reasonable mind might accept  
 2 as adequate to support a conclusion.” Richardson, 402 U.S. at 401. This Court must  
 3 review the record as a whole and consider adverse as well as supporting evidence.  
 4 Morgan v. Comm'r, 169 F.3d 595, 599 (9th Cir. 1999). Where evidence is susceptible to  
 5 more than one rational interpretation, the ALJ's decision must be upheld. Andrews v.  
 6 Shalala, 53 F.3d 1035, 1041 (9th Cir. 1995).

## DISCUSSION

### A. The Sequential Evaluation

10 A claimant is disabled under Title II of the Social Security Act if he or she is unable  
 11 "to engage in any substantial gainful activity by reason of any medically determinable  
 12 physical or mental impairment which can be expected to result in death or . . . can be  
 13 expected to last for a continuous period of not less than 12 months." 42 U.S.C. §  
 14 423(d)(1)(A). The Commissioner has established a five-step sequential process to  
 15 determine whether a claimant is disabled. 20 C.F.R. §§ 404.1520, 416.920 (2003).

16 The first step is to determine whether the claimant is presently engaging in  
 17 substantially gainful activity. Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). If the  
 18 defendant is engaging in substantially gainful activity, disability benefits will be denied.  
 19 Bowen v. Yuckert, 482 U.S. 137, 141 (1987). Second, the ALJ must determine whether  
 20 the claimant has a severe impairment. Parra, 481 F.3d at 746. Third, the ALJ must  
 21 determine whether the impairment is listed, or equivalent to an impairment listed, in  
 22 Appendix I of the regulations. Id. If the impediment meets or equals one of the listed  
 23 impairments, the claimant is presumptively disabled. Bowen, 482 U.S. at 141. Fourth,  
 24 the ALJ must determine whether the impairment prevents the claimant from doing past  
 25 relevant work. Parra, 481 F.3d at 746. If the claimant cannot perform his or her past  
 26 relevant work, the ALJ proceeds to the fifth step and must determine whether the  
 27 impairment prevents the claimant from performing any other substantially gainful activity.  
 28 Id.

1       The claimant bears the burden of proving steps one through four, consistent with  
 2 the general rule that at all times, the burden is on the claimant to establish his or her  
 3 entitlement to disability insurance benefits. Parra, 481 F.3d at 746. Once this *prima facie*  
 4 case is established by the claimant, the burden shifts to the Commissioner to show that the  
 5 claimant may perform other gainful activity. Lounsbury v. Barnhart, 468 F.3d 1111,  
 6 1114 (9th Cir. 2006).

7       **B. The Hypothetical Question Posed to the Vocational Expert**

8       Plaintiff alleges that the ALJ failed to incorporate the fingering limitations assessed  
 9 by Leonard H. Naiman, M.D., a state agency physician, into the hypothetical question he  
 10 posed to the vocational expert at the hearing. (Joint Stipulation at 7). Plaintiff argues this  
 11 omission constitutes reversible error. (Joint Stipulation at 8).

12       At step five of the sequential evaluation, the ALJ must determine whether the  
 13 claimant's impairment prevents him or her from performing any other substantially  
 14 gainful activity. Parra, 481 F.3d at 746. At this step, the burden is on the Commissioner  
 15 to show that the claimant may perform other gainful activity. Lounsbury, 468 F.3d at  
 16 1114. This burden may be met by eliciting the testimony of a vocational expert in  
 17 response to a hypothetical that sets out all of the limitations and restrictions of the  
 18 claimant. Magallages v. Bowen, 881 F.2d 747, 756 (9th Cir. 1989).

19       In order for the vocational expert's testimony to constitute substantial evidence, the  
 20 ALJ must pose a hypothetical that is based on medical assumptions supported by  
 21 substantial evidence in the record that reflects each of the claimant's limitations.  
 22 Andrews, 53 F.3d at 1044; Roberts v. Shalala, 66 F.3d 179, 184 (9th Cir. 1995). The  
 23 hypothetical should be "accurate, detailed and supported by the medical record." Tackett  
 24 v. Apfel, 180 F.3d 1094, 1101 (9th Cir. 1999).

25       The ALJ, however, need not include all of the claimant's alleged impairments in the  
 26 hypothetical. See Copeland v. Bowen, 861 F.2d 536, 540 (9th Cir. 1988). Rather, the  
 27 ALJ is required to make specific findings justifying the decision to discredit certain  
 28 alleged impairments and those justifications must be supported by substantial evidence.

1 See Gallant v. Heckler, 753 F.2d 1450, 1456 (9th Cir. 1984); Embry v. Bowen, 849 F.2d  
 2 418, 422 (9th Cir. 1988). Thus, it is proper to omit an alleged impairment from a  
 3 hypothetical if the omission of the impairment is supported by substantial evidence in the  
 4 record. Osenbrock v. Apfel, 240 F.3d 1157, 1165 (9th Cir. 2001).

5 Where a hypothetical fails to reflect each of the claimant's limitations that are  
 6 supported by substantial evidence, the vocational expert's answer has no evidentiary  
 7 value. Gallant, 753 F.2d at 1456 ("Because neither the hypothetical nor the answer  
 8 properly set forth all of Gallant's impairments, the vocational expert's testimony cannot  
 9 constitute substantial evidence to support the ALJ's findings.").

10 Dr. Naiman completed a Physical Residual Functional Capacity Assessment of  
 11 plaintiff on April 26, 2005. (AR at 174-82). Dr. Naiman indicated that plaintiff had a  
 12 number of exertional limitations including limited push and/or pull operation in plaintiff's  
 13 upper extremities. (AR at 175). Dr. Naiman indicated that plaintiff had a limited capacity  
 14 to perform fingering or fine manipulation. (AR at 177). Dr. Naiman explained that  
 15 plaintiff "[c]ould have difficulty with LUE repetitive fingering but should be able to do  
 16 fingering 1/3 to 2/3 of the time as defined for frequent in DOT/SCO." (AR at 182). Dr.  
 17 Naiman opined plaintiff "[c]ould have difficulty with fine, micro, precise, detailed  
 18 fingering but should be able to write, turn pages, use phone, finger larger objects, etc."  
 19 (AR at 182). In addition, Dr. Naiman found that plaintiff's allegations of his symptoms  
 20 to be credible and that plaintiff's impairment was consistent with the symptoms and  
 21 functional limitations that he alleged. (AR at 182).

22 Here, the ALJ presented the following hypothetical to the vocational expert:

23 For the purpose of the claimant's potential entry level work  
 24 assume the claimant [is] 46 years old with an 11th grade  
 25 education, can perform light work without pain, which  
 26 include[s] the ability to stand or walk four hours, four to six  
 27 hours out of eight hours, sit six hours out of eight and  
 28 occasionally climb, balance, stoop, kneel, crouch and crawl,

1 would there be entry level jobs the claimant could perform  
2 and [if] so what [would] the numbers of the job[s] be?

3 (AR at 201). The vocational expert testified that such an individual could work as a  
4 cashier, Dictionary of Occupational Titles (“DOT”) number 211.462-010; information  
5 clerk, DOT number 237.367-018; office helper, DOT number 239.567-010; a telephone  
6 information clerk, DOT number 237.367-046, hair dresser, DOT number 209.587-010;  
7 and a sanitary escort vehicle driver, DOT 919.663-022; and that there are a number of  
8 these jobs in the local and national economy. (AR 201-03).

9 In his decision, the ALJ expressly accepts and adopts the testimony of the  
10 vocational expert:

11 Based on the testimony of the vocational expert, the  
12 undersigned concludes that considering the claimant’s age,  
13 educational background, work experience, and residual  
14 functional capacity, he is capable of making a successful  
15 adjustment to work that exists in significant numbers in the  
16 national economy. A finding of ‘not disabled’ is therefore  
17 reached . . .[T]he Administrative Law Judge concludes that  
18 the claimant retains the capacity for work that exists in  
19 significant numbers in the national economy and is not  
20 under a “disability” as defined in the Social Security Act,  
21 at any time through the date of this decision

22 (AR at 15).

23 The manipulative limitations referred to in Dr. Naiman’s report regarding plaintiff’s  
24 fingering and fine manipulation ability were absent from the hypothetical posed to the  
25 vocational expert. (See AR at 201). The fingering limitation was not mentioned in any  
26 previous testimony at the hearing, and there is no indication that the vocational expert  
27 reviewed the medical evidence or had the opportunity to see Dr. Naiman’s report before  
28 testifying. (See AR at 190-205).

1 Substantial evidence of plaintiff's fingering limitation exists in the record. See  
 2 Richardson, 402 U.S. at 401. The Medical/Vocational Decision Guide dated April 27,  
 3 2005, indicates that plaintiff has a limited capacity for repetitive fingering, specifically  
 4 fine, micro, precise, detailed fingering. (AR at 83). A physical examination of plaintiff's  
 5 grip strength indicated plaintiff grip was poor or diminished on his left side, but was  
 6 alleged to be due to poor effort by plaintiff. (AR at 116, 167, 172). In addition, plaintiff  
 7 has complained numerous times of pain, weakness and numbness in his hands, especially  
 8 in his dominant left hand. (See AR at 73, 80, 92, 115, 142, ). Specifically, plaintiff noted  
 9 that as of August 1, 2004, he had no "real feeling" in his left hand; and that as of  
 10 September 2, 2004, he suffered from "a lot of weakness" on his left side. (AR at 73). On  
 11 February 24, 2005 plaintiff indicated in a pain questionnaire that he suffered from  
 12 numbness on the left side of his body. (AR at 80).

13 Defendant argues that the omission of the fingering limitations from the  
 14 hypothetical question is supported by evidence in the record. (Joint Stipulation at 5). In  
 15 the summary report of plaintiff's internal medicine consultation with Concepcion A.  
 16 Enriquez, M.D., dated November 11, 2004, Dr. Enriquez opined that plaintiff was able to  
 17 do fine manipulation using the fingers of both hands. (AR at 118). In the summary of the  
 18 neurological evaluation conducted by Sarah L. Maze, M.D., dated April 11, 2005, Dr.  
 19 Maze opined that plaintiff "is able to do fine motor activities with his arms and legs. He  
 20 is able to operate a keyboard and tools." (AR at 172). While the ALJ cited to the opinions  
 21 of Dr. Enriquez and Dr. Maze in his decision, he did not cite to or reference their opinions  
 22 regarding the plaintiff's fingering limitations, and failed to make specific findings  
 23 justifying his decision to discredit the allegations of plaintiff's fingering limitations. See  
 24 Gallant, 753 F.2d at 1456; Embry, 849 F.2d at 422.

25 The vocational expert's response to the hypothetical was the only evidence offered  
 26 by defendant to meet the burden of proving that plaintiff may perform other gainful  
 27 activity. Because the hypothetical posed to the vocational expert failed to reflect a  
 28 limitation supported by substantial evidence, and the ALJ failed to make specific findings

1 justifying his decision to discredit the allegations of plaintiff's fingering limitations, the  
 2 vocational expert's answer has no evidentiary value. See Gallant, 753 F.2d at 1456.  
 3 Accordingly, the ALJ erred in adopting the vocational expert's response and using it as  
 4 the basis to conclude that plaintiff was capable of making a successful adjustment to work  
 5 that exists in significant numbers in the national economy and, therefore, plaintiff is not  
 6 disabled.

7 **C. Remand is Required to Remedy Defects in the ALJ's Decision**

8 The choice of whether to reverse and remand for further administrative proceedings,  
 9 or to reverse and simply award benefits, is within the discretion of the Court. McAlister  
 10 v. Sullivan, 888 F.2d 599, 603 (9th Cir. 1989). Remand is appropriate where additional  
 11 proceedings would remedy defects in the ALJ's decision, and where the record should be  
 12 developed more fully. Marcia v. Sullivan, 900 F.2d 172, 176 (9th Cir. 1990).

13 Here, the Court finds remand appropriate. The ALJ failed to present the vocational  
 14 expert with a complete hypothetical and, thus, relied on the vocational expert's testimony  
 15 in error. On remand, if the ALJ chooses to use the testimony of a vocational expert as  
 16 evidence that plaintiff may perform other gainful activity, the ALJ must pose a complete  
 17 hypothetical to the vocational expert that includes all of plaintiff's limitations, and the  
 18 ALJ must make specific findings justifying the decision to omit any allegations of  
 19 limitations that are supported by substantial evidence in the record.<sup>1</sup>

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21 **ORDER**

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 24 <sup>1</sup> In the Joint Stipulation, plaintiff also contends that the ALJ erred in failing to  
 25 properly consider the opinion of Dr. Naiman. As explained above, however, the ALJ's  
 26 error in failing to present a complete hypothetical constitutes sufficient reason to  
 27 remand this case. Moreover, depending on the outcome of the proceedings on remand,  
 28 the ALJ will have an opportunity to address plaintiff's other arguments again. In any  
 event, the ALJ should consider all the issues raised by plaintiff in the Joint Stipulation  
 when determining the merits of plaintiff's case on remand.

The Court, therefore, VACATES the decision of the Commissioner of Social Security Administration and REMANDS this action for further administrative proceedings consistent with this Memorandum Opinion and Order.

**LET JUDGMENT BE ENTERED ACCORDINGLY.**

DATED: September 28, 2007

JENNIFER T. LUM  
UNITED STATES MAGISTRATE JUDGE  
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